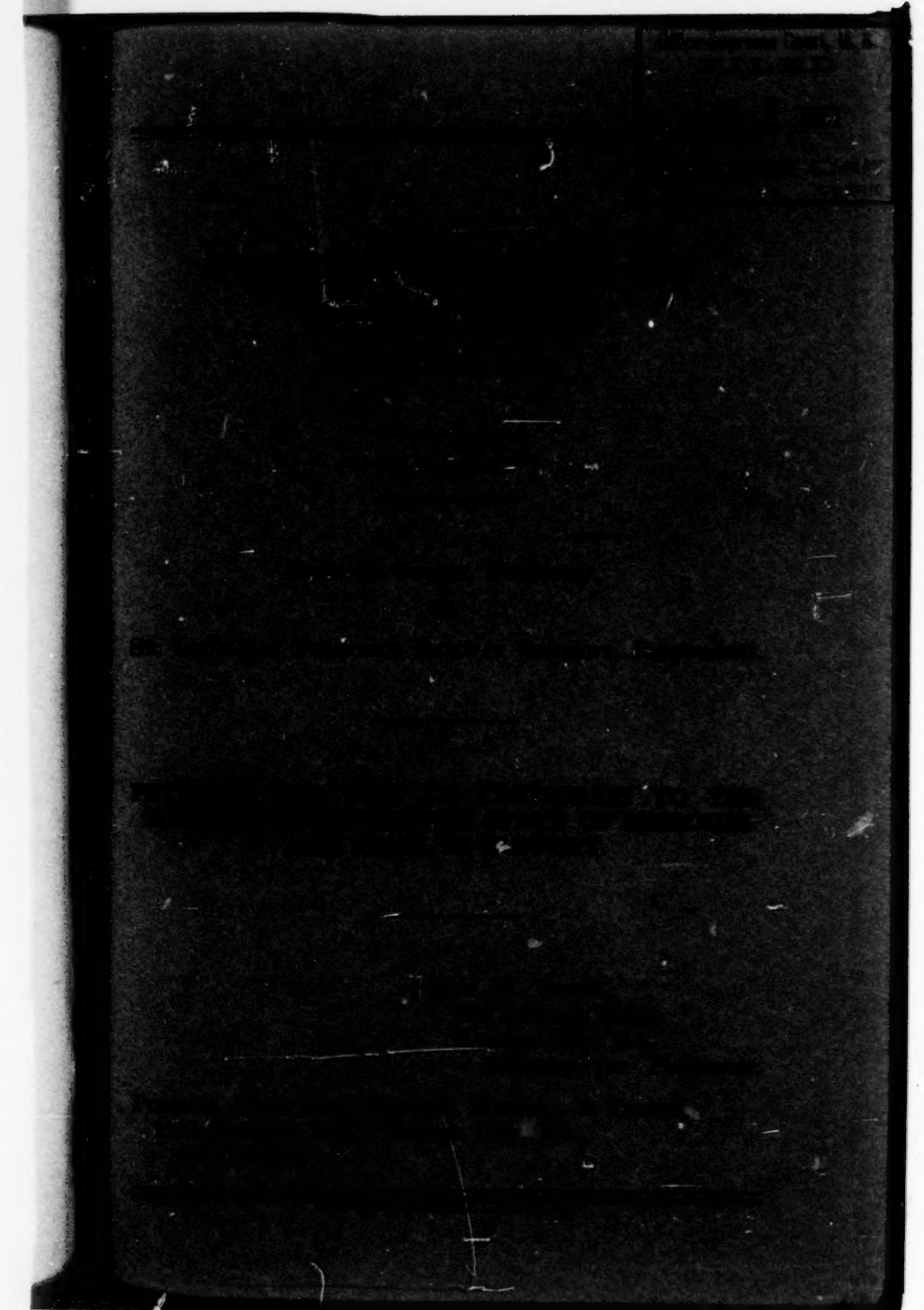

SUBJECT INDEX.

PAGE

Petition for writ of certiorari 1

Summary statement 2

Jurisdictional statement 9

The questions presented 10

Reasons for allowance of writ 11

Brief in support of petition for writ of certiorari 16

Opinion below 16
(Shown in Appendix A, pages 37-53)

Jurisdictional statement 17

Statement of the case 18

Specifications of error 19

Summary of points 20

Argument 22

Conclusion 35

Appendix 37

TABLE OF CASES.

Allen v. Ross, 292 S. W. 732 ..... 21, 31

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 ..... 9, 11, 13, 21, 33

Brown v. Western Railway of Alabama, 338 U. S. 294, 70 S. Ct. 105, ... L. Ed. 14, 21, 34

Chicago, St. P. M. & O. R. Co. v. Muldowney (8th Cir.), 130 F. (2d) 971, cert. denied, 317 U. S. 700, 63 S. Ct. 526, 87 L. Ed. 560 ..... 20, 22

Fitzsimmons v. Missouri Pac. R. Co., 294 Mo. 551, 242 S. W. 915 ..... 21, 30

PAGE

Goodman v. Chicago, B. & Q. R. Co., 280 Ill. App. 320, 7 N. E. (2d) 393 ..... 20, 27

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 ..... 9, 11, 12, 21, 34

Ottley v. St. Louis-San Francisco Ry. Co., 232 S. W. (2d) 966 1

Southern Ry. Co. v. Smith, 223 Ala. 583, 137 So. 398 ..... 20, 26

Southern Ry. Co. v. Woodward, 39 Ga. App. 173, 146 S. E. 561 ..... 21, 28

Tennant, Admrx. v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 ..... 9, 11, 21, 34

Terminal R. Association of St. Louis v. Schorb, 151 F. (2d) 361 ..... 20, 22

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 ..... 9, 11, 13, 21, 31, 32

TEXTBOOKS AND STATUTES CITED.

Sec. 1651, New Title 28, U. S. C. A. 9, 17

Sec. 2101, New Title 28, U. S. C. A. 9, 17

Sec. 54, Title 45, U. S. C. A. 32

Rule 38, Supreme Court of the United States 17

Supreme Court of the United States

October Term, 1950.

No. ———

JOHN S. OTTLEY, *Petitioner,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner, John S. Ottley, respectfully presents this petition for review on writ of certiorari of the decision of the Supreme Court of the State of Missouri, in this case, Ottley v. St. Louis-San Francisco Railway Company, ...Mo....., 232 S. W. (2d) 966, Appendix A, pages 37-53 (T. 193-206), an action under the Federal Employers' Liability Act in which your petitioner had judgment of $10,200.00 on the jury's finding that his railroad-employer was guilty of negligence toward him as a matter of fact, and which judgment the Supreme Court of the State of Missouri reversed outright, holding that the railroad was not guilty of any negligence toward petitioner, as a matter of fact.

SUMMARY STATEMENT.

Petitioner, a freight car inspector and repairman, was injured February 17, 1946, while working in respondent's Rosedale, Kansas, freight yard, a busy "classification" yard in which about 700 cars were received daily (170). The yard consisted primarily of a large number of parallel switch tracks, used in breaking and making freight trains and in transferring cars or "cuts" (cars coupled together) from one train to another. The switch tracks ran northeast-southwest and at each end were connected with a lead track. Switch engine crews operated on and off the lead tracks, "kicking in" or shunting cars or cuts upon some of the switch tracks and removing them from others.

Petitioner's work constantly required him to go from one track to another in the yards, and across the tracks which were occupied by standing strings of coupled cars (8). The work in the yards was very heavy and petitioner was required to work seven days a week and often double shifts, sixteen hours a day. His foreman had instructed him to cut through standing strings of coupled cars whenever it was necessary to cross a track so occupied, and not to walk down around the end of the string and then back up the other side, because that took too much ttime (10, 12, 19). The evidence showed that petitioner and other car inspectors and the foreman were constantly cutting through standing trains sometimes going over the couplers and sometimes under the couplers (12, 13). No blue flag was used when the men cut through the cars and they had been instructed not to use the blue flag on such occasions (26, 104).

When a string of cars was being made up, the first two or three cars were "tied down" by having their brakes set (97), and as other cars were shunted in, a man usually rode them to rest so that when the ordinary coupling was made, the standing string of cars was moved only 8 to 10 inches (17, 38). Petitioner had received no *specific* instructions to cut through the cars by ducking under the couplers, but that was the way he usually did it, feeling safer that way (26, 42). The couplers were about 30 inches above the ties and there was 5 feet between the car ends (25). On the date of his injury petitioner found it necessary to cross track 20 which was then occupied by a string of about 30 coupled coal cars and instead of walking around either end car or climbing over a car, petitioner crawled beneath the couplers of two cars (13). As he was so doing, four heavily loaded wheat cars were "kicked in" from the south lead track with such force that the standing string of 30 cars was knocked about 30 feet (13). Petitioner was knocked under the cars and his right foot mashed by a moving car wheel and he sustained other injuries (14). No one rode the wheat cars to rest or to brake them down (15).

In his amended petition, on which the case was tried (1-3), petitioner alleged that on the occasion of his injury it was necessary for him, in performing his duties in interstate commerce, to cross a track occupied by a long string of dead cars and "in order to go around said train it would have been necessary for him to travel several hundred feet, and in such circumstances he was ordered, directed and required" by respondent "to go under or over said standing cars and it was part of his duties and orders to go under said standing cars at said time in order to cross said tracks and get on the other side; that he attempted in accordance with

orders of his superior and in accordance with the usual custom and practice to pass under said standing cars and was in the act of so doing and engaged in performing his customary duties as aforesaid when and where" respondent "negligently and without warning caused said cars to be negligently and violently and with unusual and extraordinary and unnecessary force struck and violently knocked, shunted, rolled and moved"; that respondent was negligent in "ordering, directing and requiring plaintiff to pass under said standing cars and violently and without warning colliding with and striking same" and "in so failing to provide and maintain a reasonably safe place to work and reasonably safe working conditions." Respondent, after denying generally, alleged that plaintiff's injury "was directly caused by plaintiff's own careless and negligent failure to exercise ordinary care and caution for his own safety and by plaintiff's violation of safety rules and regulations of his employment and particularly rules 7, 35, 316 and 317, set out in the answer" (4-5).

Plaintiff's Instruction No. 1 (182-183) covered his entire case. It so clearly and succinctly sets forth his recovery theory that we feel its reproduction here will greatly aid the Court without unduly lengthening this statement:

> "1. The Court instructs the jury that it is conceded that defendant took over all the assets and railroad system of the predecessor owner and employer and became responsible for the legal liability, if any, of the employer to plaintiff herein, and if you believe from the evidence that plaintiff and his then employer at the time and place in question were engaged in work that was part of interstate commerce and interstate transportation;

"2. And if you so find from the evidence that at the time of plaintiff's injuries and prior thereto, it was a long standing practice and custom of the employees engaged in such work not to go around the end of such cars but to go between the cars in the doing of such work, and in the manner that the plaintiff was going and doing at the time of his injury, and further find from the evidence that prior to his injuries, his then employer, through the foreman over plaintiff, had instructed and told the plaintiff that it was not necessary and they would not be required to go around the end of the cars and for him to go between the cars in doing such work as he was doing at the time of the injury and under the same or similar circumstances in evidence;

"3. And if you so find the foregoing in Paragraph 2, and further find from the evidence that on the occasion of the plaintiff's injury, the cars were standing on the track, and that it was necessary for the plaintiff in the performance of his duties to get to the other side thereof, and find from the evidence that in attempting to go between the cars on the occasion of his injury, the plaintiff was doing so in accordance with said long standing custom and practice, if you so find, and that he was observing and working according to what his then foreman had instructed and told him to do, if you so find from the evidence, then you are instructed that it was the duty of the defendant's then employer to exercise ordinary care to have and maintain the place in a reasonably safe condition while plaintiff was so going between such cars; and if you so find the foregoing; and

"4. Further find from the evidence that while the plaintiff was so going between said cars under such circumstances, if you so find, cars being handled by other employees were caused and permitted to come against said standing cars on said track with extraordinary and unusual and unnecessary force,

and that by reason thereof, if you so find, said cars were thereby knocked and moved along the tracks and in a manner that was dangerous to plaintiff; and if you find from the evidence the foregoing, and further find from the evidence that by reason of the foregoing, the plaintiff's then employer failed to exercise ordinary care for the reasonable safety of the plaintiff under the facts and circumstances in evidence, or such care as ordinarily careful and prudent persons would ordinarily exercise under the same or similar circumstances in evidence, and find that by reason thereof, defendant was guilty of negligence;

"5. If you so find the foregoing and further find from the evidence that such negligence of plaintiff's then employer directly caused the plaintiff to be injured, or directly contributed to the plaintiff's alleged injuries, then in either event, your verdict must be for the plaintiff, Mr. Ottley, and against the defendant.

"6. And if you so find from the evidence the foregoing issues and propositions in favor of plaintiff, then it would be your duty to find a verdict for plaintiff even if you believed from the evidence that he was guilty of contributory negligence."

Respondent's theory of its nonliability to petitioner is embodied in its Instruction No. 9 (186):

"The Court instructs the jury that if you find and believe from the evidence that on February 17, 1946, the rules of the defendant in force and effect in the Rosedale yards prohibiting employees from crawling under cars or equipment unless proper protection was provided, and that on said date said rule was in full force and effect and that plaintiff, with knowledge thereof, carelessly and negligently attempted to crawl beneath the couplers of the cars mentioned in evidence and that such conduct on the

part of the plaintiff, if you so find, was the sole cause of whatever injuries were received by plaintiff at said time and place and that the defendant was not guilty of any negligence as defined in other instructions herein, then your verdict must be for the defendant and against the plaintiff."

The jury returned a verdict in plaintiff's favor, assessing his damages at $10,200.00 (186), and judgment was entered accordingly (187). Thus the jury found the facts to be as testified to by plaintiff and as hypothesized in his Instruction No. 1, and established that the respondent was guilty of negligence to petitioner as a matter of fact.

The Supreme Court of the State of Missouri in its opinion in effect found for the respondent under its Instruction No. 9 and reversed and remanded outright, holding:

Plaintiff's testimony that he had been instructed to "cut through" the cars and "not to walk around the ends of cars, for us to cut across," and that he "had never been instructed how to do it, just to get across," embraced no *specific* direction to plaintiff to crawl under the couplers, and so the Court concluded, "Plaintiff failed to prove any orders from his superior which would excuse the doing of an act which plaintiff knew to be dangerous and in flagrant violation of the rules."

Plaintiff went under the couplers on the occasion of his injury "for his own convenience."

Defendant owed no duty to plaintiff under the circumstances to warn him that the wheat cars were about to be kicked in.

Defendant owed no duty to plaintiff while he was cutting through the cars by passing under the couplers.

Plaintiff was negligent in cutting through the cars by going under the couplers in violation of the printed rules and such negligence of the plaintiff was the sole proximate cause of his injuries.

Defendant was guilty of no negligence to the plaintiff as a matter of law.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked on the ground that important, substantial questions of Federal law are present, pettitioner's rights arising under Sec. 51, 45 U. S. C. A. The jury found the respondent guilty of negligence to petitioner. There was evidentiary basis for the jury's verdict. The Supreme Court of the State of Missouri erroneously deprived the petitioner of the benefit of a jury trial and so took away from him a goodly portion of the relief which Congress afforded him under Sec. 51. In addition, the Supreme Court of the State of Missouri erroneously weighed the conflicting evidence, judged the credibility of the witnesses and so arrived at a conclusion opposite from the one reached by the jury. We respectfully submit that those same grounds for the exercise of this Court's jurisdiction exist here as existed in the following cases in which this Court allowed petitions for writ of certiorari:

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967;
Bailey v. *Central Vermont R. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

This Court is empowered to issue the writ prayed for. Sec. 1651, New Title 28, U. S. C. A. The procedure prescribed by Sec. 2101, New Title 28, U. S. C. A. and Rule 38 of this Court has been complied with. Petitioner had judgment in the trial court May 26, 1949 (186). De-

defendant's motion for new trial (189-190) was overruled August 29, 1949 (190). Notice of appeal was filed September 1, 1949 (191). Division One of the Supreme Court of the State of Missouri filed its opinion in this cause, reversing on September 11, 1950 (193-206).

On September 25, 1950, and within the time allowed by Rule 1.19 of the Supreme Court of Missouri, petitioner filed his motion for rehearing, or in the alternative for transfer of the cause to the Court *en banc* (206-211). On October 9, 1950, the Supreme Court of Missouri denied the petitioner's motion for rehearing or for transfer of the cause to the court *en banc* (215), and the decision of reversal became final on that date, the Supreme Court of Missouri being the court of last resort in that state. On October 13, 1950, the Supreme Court of Missouri ordered its mandate stayed pending this petition for writ of certiorari (216). On December 29, 1950, and within 90 days of October 9, 1950, this Court entered its order extending the time for the filing of this petition for writ of certiorari in this cause to and including February 8, 1951 (221).

The printed transcript of the record, this petition and supporting brief are filed prior to said last date.

THE QUESTIONS PRESENTED.

I.

Did not the Supreme Court of the State of Missouri erroneously destroy petitioner's important, substantial rights to recovery under the Federal Employers Liability Act by depriving him of a jury trial on the issue of respondent's negligence, and the findings thereon which the jury made in his favor?

II.

Was there a complete absence of probative facts to support the conclusion reached by the jury?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Petitioner sincerely believes and respectfully urges that important and substantial rights created in his favor by the Federal Employers' Liability Act have been destroyed by the decision of the Supreme Court of the State of Missouri complained of which fails to follow the Federal decisional law formulating and governing his rights, in the following:

I.

The record contains evidence from which the jury could, and did, find that petitioner was ordered to cut through the cars by going under the couplers. The Supreme Court of Missouri deprived petitioner of the benefit of a jury trial and the jury's finding by holding that petitioner was not instructed to pass under the couplers, and its opinion is therefore in conflict with:

Bailey, Admrx., v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444;

Tennant, Admrx., v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520;

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967;

Lavender v. *Kurn*, 327 U. S. 645, 652, 653, 66 S. Ct. 740, 743, 744, 90 L. Ed. 916.

II.

The record contains evidence from which the jury could, and did, find respondent negligent in ordering petitioner to cut through the standing cars.

Please see cases under I, *supra.*

III.

The record contains evidence from which the jury could, and did, find that the wheat cars were caused and permitted to move against the standing cars on the track with extraordinary and unusual and unnecessary force, knocking and moving the standing string in a manner which was dangerous to petitioner and that by reason thereof the respondent failed to exercise ordinary care for the reasonable safety of petitioner under the facts and circumstances in evidence and failed to exercise ordinary care to have and maintain the place in a reasonably safe condition while petitioner was going between the cars, and the contrary holding of the Supreme Court of the State of Missouri erroneously deprived petitioner of the benefit of a jury trial in violation of the firmly established Federal rules announced in the cases cited under I. *supra.*

In *Lavender* v. *Kurn* this Court said: "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is

free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Bailey, Admrx.*, v. *Central Vermont Ry. Inc.*, this Court said with respect to the remedy afforded workers under the Federal Employers' Liability Act: "To deprive tthese workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

IV.

In holding that respondent was guilty of no negligence toward petitioner as a matter of law and that his injuries resulted from his assumption of the inherent risks in negligently passing under the couplers, the Supreme Court of Missouri erroneously followed the decisional philosophy of *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513, which was specifically overruled in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967.

V.

Throughout its opinion the Supreme Court of Missouri concerns itself almost exclusively with what it calls the negligence of petitioner, stressing, emphasizing, reiterating and re-emphasizing the railroad's evidence of its rules and petitioner's failure to comply with them, and its approach to and consideration of the case is similar to that exercised by the Georgia Court of Appeals

in *Brown* v. *Western Ry. of Alabama,* 77 Ga. App. 780, 49 S. E. (2d) 833, in which this Court granted certiorari, 338 U. S. 294, 298, 70 S. Ct. 105, 107, ...L. Ed. ....., and reversed, saying: "Here the Georgia Court has decided as a matter of law that no inference of railroad negligence could be drawn from the facts alleged in this case. Rather the Court itself has drawn from the pleadings the reverse inference that the sole proximate cause of petitioner's injury was his own negligence. Throughout its opinion the appellate court clearly reveals a preoccupation with what it deemed to be petitioner's failure to take proper precautions."

We respectfully submit that the opinion of the Supreme Court of the State of Missouri contains the same vice.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari be issued out of this Court directed to the Supreme Court of the State of Missouri, commanding said Court to certify and send to this Court a transcript of the record in the case entitled John S. Ottley, respondent, v. St. Louis, San Francisco Railway Company, appellant, No. 41703, including also the proceedings in said Court, to the end that the decision of the Supreme Court of the State of Missouri in said cause may be reviewed and determined by this Court and the judgment of the Supreme Court of the State of Missouri be reversed.

Respectfully submitted,

JOHN S. OTTLEY,
Petitioner,
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1111 Scaritt Bldg., Kansas City, Mo.,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

As of the date of the filing of this brief, the opinion of the Supreme Court of the State of Missouri has not been published in the Official Missouri Reports. The case is reported in Volume 232 S. W. (2d) 966. The opinion appears in the printed transcript of the record at pages 193-206, and is incorporated in this brief, Appendix A, pages 37-53, as a convenience to the Court.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Secs. 1651 and 2101, New Title 28, U. S. C. A., and under Rule 38 of this Court on the grounds appearing in the Reasons for Allowance of the Writ contained in the petition for writ of certiorari, pages 11-14, incorporated herein by reference. We also incorporate by reference the jurisdictional statement appearing in the petition for writ of certiorari, pages 9-10.

STATEMENT OF THE CASE.

The summary statement contained in the petition for writ of certiorari, pages 2-8, which we incorporate herein by reference to conserve the time of the Court, contains practically all that is material to consideration of the questions presented. Other evidence will be called to attention, and commented on by us, in our argument which follows.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of the State of Missouri erred in holding, as a matter of law, that petitioner's injuries were solely caused by his own negligence in passing under the couplers in violation of respondent's written rules.

II.

The Supreme Court of the State of Missouri erred in holding, as a matter of law, that petitioner had not been instructed to pass through standing strings of cars by going under the couplers.

III.

The Supreme Court of the State of Missouri erred in holding that respondent was under no duty to petitioner as he was cutting through the string of cars by passing under the couplers in compliance with his instructions.

IV.

The Supreme Court of the State of Missouri erred in holding, as a matter of law, that respondent was not negligent in producing the extraordinary, unusual and violent movement of the string of cars by which petitioner was injured.

V.

The Supreme Court of the State of Missouri erred in depriving petitioner of the benefit of a jury trial and the favorable findings made by the jury, and in so doing, failed to follow the controlling authorities of this Court.

VI.

The Supreme Court of the State of Missouri erred in reversing the judgment for petitioner.

SUMMARY OF POINTS.

I.

Proof that petitioner was cutting through the standing string of cars by p ssing under the couplers in obeyance to instructions to do so, and in keeping with the general custom so to do prevailing in respondent's yards, and that he was injured as a result of an unusual, violent and extraordinary coupling movement rendered respondent negligent and sustained the jury's findings of such negligence.

A. In testing a plaintiff's case the evidence and inferences reasonably to be drawn therefrom must be viewed in the light most favorable to him.

Terminal R. Association of St. Louis v. *Schorb,* 151 F. (2d) 361;

Chicago, St. P., M. & O. R. Co. v. *Muldowney* (8th Cir.), 130 F. (2d) 971, cert. denied, 317 U. S. 700, 63 S. Ct. 526, 87 L. Ed. 560.

B. Since the evidence showed that it was customary for all of respondent's car inspectors and their foremen to cut through standing strings of cars in violation of its written rules, the rules were waived.

Southern Ry. Co. v. *Smith,* 223 Ala. 583, 137 So. 398.

C. Negligence cannot be imputed to petitioner for not following the written rule since compliance therewith was rendered impossible by the oral orders given by his foreman.

Goodman v. *Chicago, B. & Q. R. Co.,* 280 Ill. App. 320, 7 N. E. (2d) 393.

D. The respondent was negligent in ordering petitioner to cut through the cars and in producing the unusual, violent and extraordinary coupling movement which injured petitioner.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;
Bailey v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Southern Ry. Co. v. *Woodward*, 39 Ga. App. 173, 146 S. E. 561;
Fitzsimmons v. *Missouri Pac. R. Co.*, 294 Mo. 551, 242 S. W. 915;
Allen v. *Ross*, 292 S. W. 732.

II.

The record affords probative facts which support the conclusions reached by the jury, and the Supreme Court of the state of Missouri erred in depriving petitioner of his right to a jury trial and the benefit of the findings made in his favor by the jury.

Tennant, Admrx., v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Brown v. *Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105, ... L. Ed. .....

ARGUMENT.

We respectfully urge that the record supports every factual predicate of liability contained in petitioner's Instruction No. 1 (182-183) and which the jury established to be true by its verdict in petitioner's favor (186).

In its opinion, and as a basis for the erroneous result reached, the Supreme Court of the State of Missouri says, "There was no evidence that inspectors were ever directed to crawl *under* the cars or *under* the couplers. Plaintiff admitted that he had never received such instructions." (Emphasis by the Court). In reaching that conclusion the Supreme Court of the State of Missouri erroneously denied petitioner the benefit of the reasonable inferences favorable to petitioner and which the jury's verdict established. It is, of course, the rule that in testing a plaintiff's case the evidence and inferences reasonably to be drawn therefrom must be viewed in the light most favorable to plaintiff. *Terminal R. Association of St. Louis* v. *Schorb,* 151 F. (2d) 361, 365; *Chicago, St. P., M & O. R. Co.* v. *Muldowney* (8th Cir.), 130 F. (2d) 971, cert. denied, 317 U. S. 700, 63 S. Ct. 526, 87 L. Ed. 560.

The record shows that petitioner's duties required him to cross and re-cross the tracks from one side of the yard to the other many times a day (8), the work was very heavy and petitioner was required to work seven days a week and sometimes doubled over, working 16 hours a day (19). There was a written rule that no men were supposed to crawl under cars (9), but the orders from his foremen were to cut through the cars to do the work, "The car foreman said not to walk around the end of the cars, for us to cut across, it took too much time to cut around the cars, and get the work done" (10). It

was the general custom and practice for the men to cut across the cars to go from one side to the other to save time and get the work done (11). His foreman, Paul Dean, said to cut across and get the work done, many times a day, and Foreman Dean "went ahead of me and went back of me, crossed the trains the same time I would and the same as we all did" (12). His other foreman, Joe Insland, cut across with petitioner (12). And in all the time that petitioner worked in the yards he never saw anyone walk clear down around the end of a long string of cars to get across (12).

Paul Dean did not instruct him to crawl under the couplers, the instructions were "to get across between the cars, get through the cars" (26). Nor were there any instructions to go over the cars, the men never went over the cars "because you would have to climb up one end and when you would get on top you would have to walk the full length of the car and climb down" (42), the men were not allowed to do that, the orders were to get through, to cut through (42). It was dangerous to go through the cars by going over the couplers, "if you step on the couple, and your foot slips off between a couple and the couple block you would cut it off." It was safer to go under the couplers (42). His foreman, Paul Dean, went under the couplers on standing strings, and petitioner had seen all the men do that many times, it was always done (68). Defendant's witness Parish, a car inspector for respondent, testified that the blue flag rule did not apply to men cutting across the cars, and that the men cut across the cars (104). Foreman Dean, respondent's witness, testified that the blue flag rule did not apply to men cutting through the cars (120), that he himself cut through the cars many times (121), that the men frequently crawled through a standing string of cars to save time (125, 126), to save time and get more

work done (126), that he had crawled through the cars and had seen the other men do it (127). Respondent's witness, Switchman Snook, testified that he had many times seen the car inspectors cut across a string of cars (154).

We respectfully urge that on this testimony the jury could infer that the oral orders to petitioner to cut through the standing string of cars to save time and to get the railroad's work done, were broad enough to cover the very method which petitioner chose as safest and which the evidence showed Foreman Paul Dean himself used on occasions and that such orders constituted negligence.

We respectfully submit that the Supreme Court of the State of Missouri was in error in holding that the oral orders to Mr. Ottley were not broad enough to permit him to choose his own way of cutting through the cars. We believe the Supreme Court of the State of Missouri was in error in holding that without a specific order to petitioner to crawl under couplers the record was devoid of any proof that he was ordered to crawl under the couplers. The jury drew the reasonable inference from the testimony to which we have called attention that petitioner had been instructed to pass under the cars in the exact manner he was following at the time of his injury, and so the Supreme Court of the State of Missouri erroneously deprived petitioner of trial of this issue by jury and deprived him of the benefit of the jury's finding, contrary to the controlling decisions of this Court.

The Supreme Court of the State of Missouri, in its reasoning toward the erroneous result reached, said, "Yet, for his own convenience, he attempted to crawl through." We ask, how could petitioner's convenience be so served? He was not on piece work. His pay went on

if it took him all day to walk down to the end of a long string of cars and then back up on the other side to get across an occupied track. He followed his orders, to the best of his ability and judgment, to get the railroad's work done. The instructions to cut through the cars were not for the benefit of the convenience of the men, they were for the benefit of the respondent. The conclusion of the Supreme Court of the State of Missouri that petitioner was crawling under the couplers for his own convenience is not supported by the record. It is not supported by reason. It only serves to demonstrate how clearly that Court was preoccupied with what it deemed to be petitioner's failure to take proper precautions.

Having established, we believe, that the evidence and the inferences reasonably springing therefrom, supported the jury's finding that the petitioner had been instructed by his foreman to pass under the couplers in the exact manner he was following at the time of his injury, was the respondent under no duty to petitioner to keep the space in which he was then working, the space through which he was passing, reasonably safe?

The Supreme Court of Missouri held, as a matter of law, that it was not. We most respectfully urge that the Court was in error. In the ordinary coupling movement as shown by petitioner's testimony, the standing cars would not have moved over 8 or 10 inches (17). It was 5 feet between the car ends. The couplers were 30 inches above the rails (25). Passing under the center of the couplers, petitioner would not have been injured if the ordinary movement of 8 to 10 inches had occurred when the coupling was made because there would be at least a foot and a half of clearance between him and the ends of the cars. Since the cars to be coupled on that particular track came from the south, if he ducked under the couplers along the south edge of the car to the north of

him there would be over 3 feet between him and the north end of the car to his south, and the ordinary movement of 8 to 10 inches could not possibly have affected his safety in cutting through as he did. The railroad had ordered all of its car inspectors to cut through the trains to save its time and to get its work done (11). The foremen, who gave the orders, themselves cut through the cars (121). The switchman on the crew which shunted the wheat cars in knew that the car inspectors were constantly cutting through the cars (154). Their practice in doing so must be held to have been a matter of general knowledge in the yards.

The Supreme Court of the State of Missouri erroneously held that petitioner's violation of the written rules in passing under the couplers was the sole proximate cause of his injuries. But there was no rule here since it had been customarily violated by all of the car inspectors in the yard, as all of the evidence showed. In *Southern Ry. Co.* v. *Smith,* 223 Ala. 583, 137 So. 398, 405, the Supreme Court of Alabama said:

> "If it has been customary for employees to violate a rule, and such custom has been so extensive and persistent that it may be inferred that it was known to the employer who acquiesced in its breach, it may have the effect of waiving it. *Louisville & N. R. Co.* v. *Richardson,* 100 Ala. 232, 14 So. 209; *St. Louis, etc., R. Co.* v. *Martin,* 165 Ark. 30, 262 S. W. 982, 984; *St. Louis, etc., R. Co.* v. *Stewart,* 124 Ark. 437, 187 S. W. 920."

The Supreme Court of the State of Missouri declared that petitioner was guilty of negligence as a matter of law in passing under the couplers in defiance of the written rules. However, it erroneously overlooked the firmly established legal principle that negligence cannot be

imputed to an employee for not following the general rule if compliance therewith is rendered impossible by other and inconsistent orders given by the master. In *Goodman* v. *Chicago, B. & Q. R. Co.*, 280 Ill. App. 320, 7 N. E. (2d) 393, 398, a case under the Federal Employers' Liability Act, the Court said:

> "As was said in Bailey on Personal Injuries, vol. 1 (2d) p. 846: 'It was said if compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his employees, negligence cannot be imputed to the employee for not following the general rule. This was said and applied where it appeared that an engineer failed to comply with a rule requiring him to reduce the speed of his train, while running through a particular yard, so as to have it completely under control, and it also appeared that this could not be done if he conformed to the time table. It was held that the rule was modified by the time schedule."

So, in our case, respondent railroad could not rely on petitioner's observance of its written rule, and the Supreme Court of the State of Missouri was wrong in so holding.

Petitioner's testimony showed that it was the practice to ride those cars which had been kicked in, to rest, so that a light coupling would be made, the only kind of a coupling necessary with the automatic couplers on the cars (17, 38). Some of defendant's witnesses testified that when cars which were kicked in got to moving too fast it was their duty to brake them down in order, as they put it, to prevent the cars or their fragile cargo from being broken up or damaged (97, 118). Surely, if the cars could be and were braked down for such purposes, was it not the duty of the respondent to brake them down in order to prevent injury to employees who, they had

every reason to believe, might be passing through the standing string at any given moment? The Supreme Court of the State of Missouri held there was no such duty to respondent's employees, and apparently chose to believe the engineer of the switch crew which kicked the wheat cars in and who testified that it was not unusual to knock a standing string of thirty cars four car lengths, 160 feet, when such a coupling was made (146). Will reason bow to the Supreme Court of the State of Missouri or will it find itself in accord with the jury's verdict which held that the extraordinarily violent and unusual movement occurring while petitioner was under the couplers, which knocked the standing string of cars at least thirty feet, was negligence?

In *Southern Ry. Co.* v. *Woodward*, 39 Ga. App. 173, 146 S. E. 561, plaintiff was employed as a car greaser in the defendant's Atlanta yards. Following the orders of his foreman to go and grease certain cars, he undertook to cross a track upon which four empty cars were standing at rest and went upon the track at a distance of 8 or 10 feet from them. His petition alleged that it was customary in this yard to have the brakes applied on cars that were standing idle so as to prevent their moving a greater distance than four or five feet when other cars were driven or kicked against them, and that the defendant was negligent in failing to observe this custom on the particular occasion. In affirming his judgment, the Georgia Court said, 146 S. E. 564:

> "The jury must have found that the operations were not carried on in the usual manner, and that if this had been done the cars would not have been driven far enough to strike the plaintiff some eight or ten feet away, else they would have returned a different verdict. 'What ought to be done is fixed by

a standard of reasonable prudence, whether it usually is complied with or not;' and yet, 'what usually is done may be evidence of what ought to be done.' *Texas & Pacific Ry. Co.* v. *Behymer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905.

"Notwithstanding a switchyard may be a place of intense action, where dangers are great and constantly recurring, it was the duty of the railway company, through each of its employes, to exercise reasonable care for the safety of the other employes, and in the discharge of such duty it was not only proper but necessary to have regard for the normal activities. *Atlantic Coast Line R. Co.* v. *Daniels,* 8 Ga. App. 775, 70 S. E. 203. True, there may have been no obligation upon any member of the switching crew to give warning or notice to the plaintiff that cars were about to be kicked against other cars on the track which the plaintiff was crossing, provided all were handled in the usual manner. But that is not the question. The defendant's main fault, if such fault existed, lay in its failure to anticipate that employes like plaintiff might at any time be passing to and fro in the yard, so conducting themselves as to be safe in the ordinary course, but in positions of instant peril if the normal course were interrupted. In such a case there would seem strong reason why the clock should do clock work.

"According to the contentions and evidence of the plaintiff, if the cars had been 'tied' with the brakes in the usual manner, they would have moved not more than five feet, or at any rate less than the distance which he had reasonably chosen for his own safety, and he would have crossed unhurt. On the contrary, something happened out of the ordinary and he was caught unawares. Under all the facts and circumstances, we cannot say that the happening was not a negligent one. Until the contrary appears, an employe ordinarily has the right to assume that his employer has exercised proper care with respect to providing a safe place of work,

> and that his fellow servants will not be negligent toward him. *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94, 34 S. Ct. 229, 58 L. Ed. 521."

We call attention to *Fitzsimmons* v. *Missouri Pacific R. Co.*, 294 Mo. 551, 242 S. W. 915, decided in 1922. The 17-year-old plaintiff was a yard clerk in defendant's Kansas City, Kansas, yards and was required to cross and re-cross its switch and transfer tracks many times a day in order to check cars. He was instructed that in walking around the rear of cars standing on the track he should go 10 feet behind the car end in order to avoid danger. The evidence showed that if there were no cars already on a transfer track the switchman would ride in the first cars to be placed on that track and set the brakes so that the standing cars would act as a bumper to stop the next cars kicked in. Plaintiff was crossing a track and was ten feet from the end of a car when some cars were kicked in with unusual force, knocking the standing cars against plaintiff and cutting off his leg. Plaintiff's instruction directed the jury to return a verdict for him if it found "said standing cars were violently struck by said other cars and shunted and set in motion and moved with excessive, unusual and dangerous rapidity, etc." Affirming, the Supreme Court of Missouri said, 242 S. W. l. c. 922:

> "We also think that the evidence tends strongly to prove that the movement of the three cars against the two cars standing on track No. 29 was in its force and rapidity of movement dangerous and unusual, even in that particular yard, and was therefore negligent with respect to this plaintiff, and the jury had the right in the performance of their duty as triers of the facts to so find."

We respectfully submit that *Fitzsimmons* cannot be distinguished on principle from the case at bar. *Fitzsimmons* was followed by the Supreme Court of the State of Missouri in *Allen* v. *Ross*, 292 S. W. 732, wherein the court affirmed a judgment in favor of a car checker injured by an unusual hazard created by the railroad's method of shunting cars, the court holding that plaintiff was not provided with a reasonably safe place in which to work. That case reached this Court on writ of certiorari, *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513, and was reversed here, this Court holding:

> "* * * the employee assumes the ordinary risks of his employment, and, when obvious, or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. * * * The members of the switching crew had a right to believe he would keep out of the way of the shunted car. * * * Neither the engineer or fireman knew where plaintiff was. * * * There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. * * * In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or take other steps to protect him."

Toledo, St. L. & W. R. Co. v. *Allen* was specifically overruled in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 66, 63 S. Ct. 444, 450, 451, 87 L. Ed. 610, where this

Court, tracing the history of Sec. 54, Title 45 U. S. C. A., said:

> "The purpose of the Act is made clearer upon analysis of the House bill which was rejected by the conference committee in favor of the Senate bill which is now the law. The House bill was intended to preserve some part of the doctrine of assumption of risk, preserving that defense except 'where said employee has not had actual notice of any negligently maintained condition or practice.' The bill, unlike the Senate bill as the Representative reporting it explained, left untouched the rule of *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513, 'namely, that in the absence of special custom or unusual circumstances, a man who is run over by a switching movement cannot recover.' It was the Allen opinion on which the court below in the instant case particularly relied. But the House bill, which the chief railroad counsel appearing before the Senate committee conceded would make no change in the existing law, was rejected in conference. The Allen case was specifically and caustically discussed at the Senate hearings, and the Senate bill was clearly aimed at ending its rule."

We respectfully submit that in holding the respondent was guilty of no negligence toward petitioner, the Supreme Court of Missouri erroneously followed the doctrine, now renounced, of *Toledo, St. L. & W. R. Co.* v. *Allen,* and erroneously failed to follow the controlling pronouncements and holding of this Court in the *Tiller* case. We respectfully submit that the Supreme Court of the State of Missouri erred in failing to follow the rule, again announced in *Tiller,* 318 U. S. 67, 68, 63 S. Ct. 451:

> "No case is to be withheld from the jury on any theory of assumption of risk and questions of negli-

> gence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, etc. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences,' the case should go to the jury."

In *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 352, 63 S. Ct. 1062, 1063, 1064, 87 L. Ed. 1444, this Court said:

> "The rights which the Act creates are federal rights protected by federal rather than local rules of law. (Citing cases.) * * * At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in federal jurisprudence. (Citing cases.) As stated by this Court in the Patton case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery.' (Citing cases.) * * * That duty of the carrier is a 'continuing one' (citing cases) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

We respectfully submit that since petitioner was ordered to cut through the standing cars the respondent owed him a continuing and non-delegable duty to maintain

the space through which he was passing in a reasonably safe condition. The unusual, violent and extraordinary movement of the standing string of cars which caused petitioner's injuries was negligence, and the jury properly so found. The opinion of the Supreme Court of the State of Missouri makes much of the fact that respondent's evidence showed that its foremen and the other car inspectors cut through the standing trains by going over the couplers or over the tops of cars. But suppose petitioner had been standing on the coupler, or on top of a car, or was walking around the end car, at the moment when the four heavily laden wheat cars struck the standing string of thirty cars with such force as to knock them 30 feet. Would injury not have resulted to petitioner? Could he then have escaped with his life? Is this not *proof* that the unusual, violent and extraordinary movement was a proximate and contributing cause of petitioner's injuries? Was not the jury justified in so finding? Is there no evidentiary basis for such finding?

We respectfully submit that the record affords probative facts which support the conclusion reached by the jury, and that the Supreme Court of the State of Missouri erred in holding otherwise. We respectfully submit that the Supreme Court of the State of Missouri was in error in reversing petitioner's judgment. We respectfully submit that the course followed by the Supreme Court of the State of Missouri conflicts with the rules that negligence is for the jury as announced by this Court in *Tennant, Admrx.*, v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, and in *Lavender* v. *Kurn*, 327 U. S. 645, 652, 653, 66 S. Ct. 740, 743, 744, 90 L. Ed. 916, and *Brown* v. *Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105, ... L. Ed. .....

Conclusion.

For the reasons noted your petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Supreme Court of the State of Missouri to the end that its action may be here reviewed and reversed.

Respectfully submitted,

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